Nos. 11775 and 11776

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 11775

LAURA GAWECKI and COLLETTE MITRE, doing business under the fictitious name of SKYLARK CAFE & RESTAURANT,

Appellants,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,

Appellee.

No. 11776

LAURA GAWECKI and COLLETTE MITRE, doing business under the fictitious name of SKYLARK CAFE & RESTAURANT,

Appellants,

vs.

DUBUQUE FIRE AND MARINE INSURANCE COMPANY OF DUBUQUE, IOWA, a corporation,

Appellee.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

Before considering the arguments advanced by the Appellees, the Appellants wish to correct an erroneous statement of fact on page 17 of the Appellees' brief.

The Appellees there stated that "To briefly recapitulate the facts relating thereto, we find first that the chattel mortgages were, in the case of the General policy, executed after, and not before the policy was applied for and become effective. And as to the Dubuque the negotiations for the insurance were prior to the execution of the chattel mortgages."

This is incorrect. The findings of fact prepared by the Appellees for the signature of the trial court, make it unmistakably clear that the chattel mortgages in question were in existence before either policy was issued; moreover, the notice of intention to mortgage was published in accordance with Section 3440 of the Civil Code of California prior to the issuance of either fire insurance policy. As regards the policy issued by the General Insurance Company of America, the trial court made the following finding:

> "That at the time of the issuing of said policy the plaintiffs were not the sole and unconditional owners of the personal property located at 7519 Sunset Boulevard, and there was at the time of the issuing of said policy in full force and effect a chattel mortgage on said property issued by plaintiffs to Walter J. McCormick and Edward A. Mattin." [General Tr. p. 23.]

A similar finding was made regarding the policy issued, or more appropriately, assigned by the Dubuque Fire and Marine Insurance Company to the Appellants:

> "As to paragraph XI of plaintiff's complaint, the Court finds that at the time of the issuing of defendants' policy and at all times thereafter and at the time of the occurrence of the fire loss and damage described in the complaint, the plaintiffs were not the

sole and unconditional owners of the personal property located at 7519 Sunset Boulevard. . . ." [Dubuque Tr. p. 22.]

Hence, Appellants' argument will be made with reference to the foregoing facts: that the both policies were issued after the property in question was mortgaged.

The argument so ably, if somewhat impatiently, presented by the Appellees is as significant for its omissions as it is for its substance. In their opening brief, the Appellants emphasized that in order to assert successfully the breach of a provision of a fire insurance contract by way of defense, that breach must have been material to the risk assumed by the insurer. Moreover, the significant silence of the Appellees is a mute affirmation of the truth of this proposition.

Necessarily, the Appellees' brief is predicated upon the assumption that a chattel mortgage on the insured property materially affects the risk assumed by the insurance company. If this be assumed, it is important to bear in mind the distinction in legal effect that arises when the chattel mortgage is placed on the property after the policy has been taken out as opposed to the situation where the property was subject to a chattel mortgage at the time the insurance was issued, as in the case at bar.

The Appellees have cited five decisions of the California appellate courts to support their contention that the existence of the chattel mortgage on the insured property gives them a valid defense: *Hargett v. Gulf Insurance Company*, 12 Cal. App. (2d) 449; *Arnold v. American Insurance Company*, 148 Cal. 660; *Allen v. Home Insurance Company*, 133 Cal. 29; *Conner v. Union Automobile Insurance Company*, 122 Cal. App. 105; *Steil v.*

Sun Insurance Office, 171 Cal. 795. In each of the decisions the insured has voluntarily done something *after* the policy has been issued in violation of the terms of the policy, which can be fairly said to have materially affected the risk. Therefore, the insurance company was not held liable for the resulting loss. Such a conclusion is sound because it would be unjust to hold that an insurance company had waived a breach of some provision of the policy of which it had no knowledge and where inquiry could not have revealed such a breach. However, the Appellants reemphasize that such is not the case presently before this court. Here, the Appellants did *absolutely nothing after the policy was issued.* This risk remained unchanged from the inception of the insurance until the loss.

The Appellees did cite one case, arising in the United States District Court Southern District of California, *Cinema Schools v. Federal Union Fire Insurance Company,* 1 Fed. Supp. 43, in which it was held that it made no difference whether the chattel mortgage on the insured property was executed before or after the policy was issued. This decision is quoted in its entirety on pages 19 and 20 of Appellee's opening brief. From a reading of the cases on this point, it is apparent that Judge Jenny misapplied the law of California. He concluded, as the Appellees would have this court do, that the provision of the California statutory fire insurance policy to the effect that any provision of the policy can be waived only by a written endorsement attached thereto must be literally applied at all times. He then makes this amazing statement:

> "Since in the case at bar the most that an inquiry could have done would have been to give the insurance

company or its agent knowledge of the existence of the chattel mortgage, the foregoing decisions are authority for holding that the failure to inquire does not constitute a waiver of the violation of the provisions of the policy."

Even the California cases cited by the Appellees contradict such a statement, which is clearly erroneous. For example, the following quotation is from the syllabus to *Arnold v. American Insurance Company,* 148 Cal. 660:

> "Notwithstanding a printed stipulation that any waiver must be made in writing and attached to the policy, such stipulation could not prevent the conduct of the officers of the company from constituting a waiver or estoppel of the company based upon its presumed knowledge, when its proper officer had knowledge, when such conduct led the insured to rely on his policy as a valid policy, although there was a breach of condition of which the company knew, in which case, it will not be heard to allege such breach against a claim for subsequent loss."

Again from the syllabus of another case cited by Appellees, *Allen v. Home Insurance Company,* 133 Cal. 29:

> "Where the only interest of the plaintiff in the insured premises was that of a mortgagee, which, by the terms of a stipulation in the policy, would vitiate it, as being 'other than the entire unconditional and sole ownership of the property,' if it appears that the insurance company knew the extent of the plaintiff's interest, and issued the policy to the plaintiff with such knowledge, all conditions inconsistent therewith were waived by such issuance."

Hence, it is submitted that, upon careful analysis, the authorities cited by the appellees do not support their arguments.

The basic issue in this appeal is whether the existence of a chattel mortgage, which had been executed before the issuance of the insurance policies, will avoid liability, where the insurer made no inquiry regarding the insureds title. Mrs. Gawecki's and Miss Mitre's intention was that they should be protected against loss if their property should be destroyed by fire. The insurance companies knew this was their intention and, presumably, by accepting the premiums paid by the Appellants and issuing policies of insurance to the applicants, the Appellees manifested an intention to insure the Appellants' property against fire loss. Certainly, the Appellants had no reason to believe otherwise. In situations such as this, the insurer, making no inquiry, cannot defend on the ground that a provision of the policy had been breached from the start. The California appellate courts have uniformly held that if the applicant had an *insurable interest* in the property, he can recover from the company. In the case of *Golden Gate Motor Transport Company v. Great American Indemnity Company,* 6 Cal. (2d) 439, at page 446, the court states as follows:

> ". . . There is no conflict in the evidence to the effect that the plaintiff had an insurable interest; that the defendant made no inquiry as to how the registration of the Hudson sedan stood; that it asked for no written application covering by question and answer the material provisions of the policy; and that it made no examination of the records of the Motor Vehicle Department. Nevertheless it rendered its bill for the premium, collected it, and still retains it.

There is not a particle of a claim that the plaintiff made false representations, nor is there any claim that the defendant did in any manner call to the plaintiff's attention the registration clause. Such facts have been held sufficient to establish a waiver. (*Raulet v. Northwestern etc. Ins. Co., supra; Sam Wong v. Stuyvesant Ins. Co.,* 100 Cal. App. 109; 5 Cooley's Brief's on Ins., 4226.)"

And in *Sam Wong v. Stuyvesant Insurance Company,* 100 Cal. App. 109, at page 112 the court says:

"Moreover defendant is in no position to set up as a defense lack of ownership or that the insured did not own the ground on which the building was situate, as it waived objection to the form of the policy and is estopped from denying liability thereunder by issuing the policy and accepting the premiums therefor without any written application having been made by the insured, and also without any discussion having been had relative to either title to the property on which the same was situate. Plaintiff herein, as owner, had an insurable interest in the building, he being in possession and operating the same as a dryer. (14 Cal. Jur., p. 465; 14 R. C. L. 915.) Prior to the adoption of the standard form of policy in this state it was held that where the assured had an insurable interest in property, and without fraud, in good faith applied for insurance upon the same, and made no actual misrepresentation or concealment of his interest therein, and the insurance company made no inquiry concerning his interest, and issued a policy to him, and accepted and retained the premium, the company must have been presumed to have knowledge of the condition of the title, and to have assured the property with such knowledge. (*Raulet v. North-*

western etc. Ins. Co., 157 Cal. 213-228; 14 R. C. L., pp. 926-932.) After the adoption of the standard form of policy, the law of waiver and estoppel remained the same as before upon this subject. (*Kavanaugh v. Franklin Fire Ins. Co.,* 185 Cal. 307, 315; 14 R. C. L., p. 932.)"

See also:

Ames v. Employers Casualty Co., 16 Cal. App. (2d) 255;

Sharp v. Scottish Union etc. Co., 136 Cal. 542;

American Employers Insurance Co. v. Lindquist, 43 Fed. Supp. 614.

Moreover, it is to be observed that the aforementioned cases demonstrate unequivocally that the California courts do not always hold that the clear and unambiguous terms of an insurance contract will always be literally followed, as the Appellees on page 23 of their brief suggest, for in these cases, the insurance policies, conforming to the mandate of the California statute, have a clause which provides that the interest of the insured in the property *must be sole and unconditional.* However, where the insurer has made no inquiry or where it has and there has been no fraud or misrepresentation by the applicant, it is consistently held in California that the insurance company waived this provision. The insistence of the California courts that the purpose of insurance will be fulfilled where the applicant has made no misrepresentations to the insurance company and that the latter will not be heard to deny liability on the ground that one of the many provisions of the policy has been violated, having made no inquiry, was recognized by Judge Fee in the case

of *American Employers Insurance Company v. Lindquist,* 43 Fed. Supp. 614, decided while he was sitting in the Ninth Circuit. In that case he stated:

> "The contention is that since Lindquist received the policy and kept it for a period of time before the loss he is somehow estopped to claim that he made no representations. This is drawing a long bow. But the California courts have clearly answered this proposition also. It is well settled in this state that where there is no fraud or misrepresentation and no written application and no inquiry into the particular subject, the failure of the insured to discover a false statement inserted by the insurer in the policy is not a defense. The technical nature of these documents is sufficient excuse for failure of the insured to read a policy or to understand it when read."

Indeed, in their comments on *Dunne v. Phoenix Insurance Co. of Hartford Conn.,* 113 Cal. App. 256, on page 26 of their brief, the Appellees concede that had the Appellants purchased the property under a conditional sales contract, they could have recovered. But because they used the other method, that of a purchase and the execution of a chattel mortgage, the Appellees' would ask this court to hold that the consequences are so dire that there is no liability. This is sophistry in an unadulterated form.

The tortuous path of the Appellees' reasoning is further manifested on pages 9, 10, and 14 of their brief. There it is urged that the existence of the chattel mortgage did not void the policy, but merely suspended it, and therefore, some consequences, which utterly escape the Appellants, must necessarily result. First of all, it would have been just as easy for the California courts to have held

that where the interest of the insured was that of a vendee under a conditional sales contract, the insurance was merely suspended, but not void. Instead, they held that where no inquiry was made by the insurance company, the insurance was neither suspended nor void, but was in full force and effect. The chattel mortgage situation presents the same issues, and should be decided in the same way. Secondly, the word "suspension" implies that the insurance may reattach at a later date. This is impossible in the case at bar since the *res* insured was completely destroyed. The result is that the appellees insist that they should be paid substantial premiums for never having assumed any risk whatsoever. This does not square with elementary concepts of justice.

Finally, it should be noted that the appellees state that in some way the existence of the chattel mortgage changed the specification of the property insured. The cases cited by the appellees do involve such a proposition. In *Steil v. Sun Insurance Office, supra,* the insurer covered the goods only while they were in the Chronicle Building, and in *National Reserve Insurance Company v. Ord,* 23 F. (2d) 73, the insurer covered the premises only while they were used as a packing plant. Unquestionably, the policies involved in both of these cases were issued as a result of applications in which the property was represented to be as it was described in the insurance policies subsequently issued. However, in the case at bar, no representation that the property was not subject to a chattel mortgage was made by the applicants, and it is most illogical and unwarranted to cite these cases to support the contention that the property destroyed by the fire in this case was different from that described in the applications of the appellants.

Conclusion.

The basic facts of this appeal are simple. A mother and her daughter, neither of whom was experienced in business, purchased a restaurant. They made a substantial down payment and executed a chattel mortgage to secure the payment of the balance. They wanted their investment covered by fire insurance and contacted an insurance agent they had known and trusted for many years. They advised the latter of all of the facts, including the fact of the chattel mortgage. She, in turn, placed the insurance with the appellees, neither of whom made any inquiry concerning the insured property. These ladies dealt in utmost good faith with the appellees and their agents, trusting the latter to provide them with the protection they desired and for which they paid the premiums demanded by the Appellees. Where the indifference of the insurer to the nature of the risk it has assumed is as manifest as it was in this case, these trusting individuals had every right to believe that they had received the protection they purchased. Under such circumstances, the insurer should not be heard to say, after a fire, that it has been paid to assume no risk whatsoever. It is difficult to see how fairminded men *can* disagree on the basic law and equities of this case.

Respectfully submitted,

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